In the Supreme Court, United States.

OCTOBER TERM, 1908.

COLUMBIA HEIGHTS REALTY CO.,
Plaintiffs in Error,
vs.
HENRY B. F. MACFARLAND *et al.*,
Defendants in Error.
No. 388.

Motion to Advance.

The writ of error in the above case is from the judgment of the Court of Appeals of the District of Columbia affirming an order of the Supreme Court of the District of Columbia and levying certain assessments against the property of the plaintiffs in error under certain acts of Congress approved March 3, 1899, and June 6, 1900, for the extension of 11th Street in said District.

The case was in this Court on appeal of the defendants in error in the October term 1902, and was dismissed for want of jurisdiction. McFarland *vs.* Byrnes *et al.*, 187 U. S. 247.

The case originated in the Supreme Court of the District of Columbia, and was filed May 31, 1899. The object of the proceeding being for the extension of 11th street from Florida Ave. to Lydecker Street in the District of Columbia. After a jury of seven in said case had made certain awards for the land taken for the extension of said

street and levied certain assessments against the abutting land for benefits, pending confirmation of same by the Court, Congress passed an act, commonly known as the Act to Extend Columbia Road East of 13th Street, and the same was approved on June 6, 1900. The provisions of said Act directed the Commissioners of the District of Columbia in case they found the assessments levied in said 11th Street case under the Act of March 3, 1889, 30 Stats., 331, void to proceed to reassess the benefits in accordance with the provisions of said Act of June 6, 30 Stats., 665.

On the 3rd day of July, 1900, said Supreme Court of the District of Columbia sitting as a District Court, passed an order confirming the award for damages and condemning the land necessary for the extension of the street but vacated and set aside the assessments for benefits and held them void.

By the first Act of Congress, March 3, 1899, the area for assessment for benefits was limited to 200 feet on either side of the street to be extended and by the act of June 6th, the area was unlimited. From the decree of July 3, 1900, setting aside the assessments, the Commissioners of the District of Columbia, the defendants in error, appealed to the Court of Appeals and the lower Court was reversed, (McFarland *vs.* Byrnes *et al.*, 19th Appeals D. C., 538), it being held that while the error had been committed in vacating the assessments, yet the appellees or property owners under the provisions of Chapter 11, Revised Statutes of the District of Columbia, which was made the mode of procedure under the Act of March 3, 1899, were entitled to a new jury of twelve.

From the ruling of the Court of Appeals, the defendants in error, then the appellants, appealed to this Court and the case was here dismissed for want of jurisdiction as aforesaid. The case then returned to the lower Court on the

mandate of this Court, and the Court of Appeals, and notwithstanding the Court of Appeals had ruled that the land owners subject to assessments were entitled to a jury of twelve under said Act of March 3, 1899, and that the same was still in force, the defendants in error believing that they could not proceed otherwise in accordance with the Act of June 6th, on the 9th of Aug. 1904, began proceedings ~~on the 9th of August, 1904~~ by filing a supplemental petition under said Act of June 6th, for the reassessment of benefits which provided for a jury of seven as aforesaid, to which supplemental petition, the property owners including the plaintiffs in error in this cause, filed certain pleas of *res adjuticata,* statute of limitation and want of jurisdiction generally in the Court. The jury summoned under said supplemental petition returned its verdict on June 6, 1906, levying assessments against the abutting property to the extent of $96,000, of which amount $24,500 was levied against the property of the plaintiffs in error.

Thereafter the plaintiffs in error and other property owners filed further exceptions and objections to the confirmation of the verdict and took certain exceptions to the rulings of the Court on overruling its pleas and to certain rulings ~~of~~ the Court as the case proceeded.

And on the 6th of May, 1907, the Supreme Court of the District of Columbia sitting as a District Court, overruled all exceptions and objections to the verdict of the jury last named, and confirmed the assessments for benefits as returned, from which order an appeal was noted and prosecuted under a bill of exceptions signed and allowed by said Supreme Court of the District of Columbia.

On the 31st day of March, 1908, the Court of Appeals affirmed said judgment, in so far as it affected the plaintiffs in error, and on the 7th day of April, 1908, a writ of error was allowed and the record filed in this Court, on the 6th

R COPY

day of May, 1908, the case being now upon the calendar of this Court and is known as No. 388.

Many of the questions involved are new and intricate and as very nearly the whole amount of said assessments levied by said last named jury are unpaid and depend upon the ruling of this Court for collection, it will be seen that an early hearing of same is very necessary. Besides the property so assessed has been listed for taxes and should be sold in March next, and unless this Court can pass upon the questions involved before said date and in case the judgment of the Court of Appeals is reversed, great complications would likely occur involving the District of Columbia in serious litigation.

The case, now pending, is only one of a great many, the other cases having been postponed for action until after this case is disposed of.

There are other proceedings now pending in said Supreme Court of the District of Columbia for the levying of assessments under said Act of June 6, 1900, on certain land abutting on Sherman Ave. in said District, and many of the same questions are involved, so it will be seen that it is of the utmost importance to the public, that this case should be disposed of at as early a date as possible.

The premises considered, the defendants in error, and the plaintiffs in error, respectfully pray the Court that this case be advanced for hearing for some time during the month of February next.

Respectfully submitted,

EDWARD H. THOMAS,
JAMES FRANCIS SMITH,
Attys. for Defendants in Error.

LEO SIMMONS,
Atty. for Plaintiffs in Error.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 157.

COLUMBIA HEIGHTS REALTY COMPANY, PLAINTIFF IN ERROR,

vs.

HENRY B. F. MACFARLAND ET AL. COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

By Section 3 of an Act of Congress approved March 3, 1899, (*30 Stat. 1344*) the Commissioners of the District of Columbia were directed to institute within ninety days in the Supreme Court of the District of Columbia, a proceeding to condemn land for the extension of Eleventh Street from Florida Avenue to Lydecker Avenue. The statute also provided, that at least one-half of the damages awarded for and in respect of the land condemned should be assessed against abutting lands to a depth of 200 feet on each side of the street to be condemned; and further, that the proceedings should be under and according to the provisions of Chapter Eleven of the Revised Statutes, D. C. By Sec-

tion 257 of Ch. II., Rev. St., D. C., it is provided that damages shall be assessed by

> "A jury of seven judicious, disinterested men, not related to any party interested;"

and, by Sec. 263, it is provided that,

> "If the proper authorities, or any owners of the land are dissatisfied with the verdict thus rendered, and no arrangement being made between them, the marshal shall be ordered to summon a second jury of twelve judicious, disinterested men, not related to any one interested"

who shall determine the damages, etc.

May 31, 1899, John B. Wight, John W. Ross and Lansing H. Beach, then Commissioners of the District of Columbia, filed their petition in the Supreme Court of the D. C., for the condemnation of the land necessary to the extension of Eleventh Street, a jury of seven was summoned, and on February 20, 1900, a verdict was returned, one-half of the total award of damages being assessed against the abutting property as benefits. (Rec. 4, 5.) To this verdict John Sherman and A. M. Hoyt, owners, under whom the plaintiff in error claims title, filed exceptions. While these exceptions were pending Congress passed an Act, approved June 6, 1900 (31 Stat., 665), for condemnation of lands for other streets, section 4 of which provided that the Court should

> "cause a jury of seven judicious, disinterested men, not related to any person interested in the proceedings, and not in the service or employment of the District of Columbia or of the United States, to be summoned by the marshal of the District of Columbia, to which jurors said Court shall administer an oath or affirmation *that they are not interested in any manner in the land to be condemned nor are in any way related to the*

> *parties interested therein, and that they will, without favor or partiality, to the best of their judgment, assess the damages each owner of land taken may sustain by reason of the extension of said street, and the condemnation of lands for the purposes of such extension, and assess the benefits resulting therefrom as hereinbefore provided.* The Court before accepting the jury shall hear any objections that may be made to any member thereof, and shall have full power to decide upon all such objections and to excuse any juror, or cause any vacancy in the jury when impaneled to be filled."

Section 17 referred to the proceedings for the extension of Eleventh Street under the Act of 1899, authorized the Commissioners of the District of Columbia to apply for the ratification of the awards of the jury in respect of that extension; and provided further that in the event that the assessments for benefits should be for any reason declared void, the Commissioners should make application

> "for a reassessment of such benefits under and in accordance with the provisions of this Act."

It will be noticed that this Act of 1900 differs from the Act of 1899 in several particulars, but especially as to the assessment area, which is confined by the Act of 1899 to 200 feet on either side of the street to be opened, while in the Act of 1900 the area is without limit.

July 3, 1900, on motion of the Commissioners to confirm the awards and assessments as made, the court *confirmed the awards for damages, and vacated the verdict as to benefits.* (Rec. pp. 6, 7.) The Commissioners appealed from so much of the judgment as vacated the assessments for benefits. The Court of Appeals, constrained by the decision of this Court in *Wight* v. *Davidson,* 181 *U. S.,* 371, reversed

the judgment and remanded the cause, holding, however, that since

> "by the discordant tenor of judicial decision" the appellees were induced to forego their right to a second jury of assessment, that right should be restored to them, should they desire to avail themselves of it."
>
> (McFarland v. Byrnes, 19 App. D. C., 531, 538.)

From the judgment of the Court of Appeals, the Commissioners appealed to this court. This appeal was dismissed for want of jurisdiction (Rec. p. 9), and the mandate of the Court of Appeals filed in the Supreme Court, D. C., July 22, 1903. Nothing further was done until March 4, 1904, when the Commissioners again moved the Court to confirm the assessments for benefits, and the Court, after a hearing, overruled the motion, and ordered

> "in case the petitioners desire to proceed further in the premises, that they shall within a reasonable time make application to this Court for directing the United States marshal to summon a jury of twelve as provided by law."

The Commissioners appealed in open Court (Rec. p. 10).

No further action having been taken by the Commissioners, the property owners gave notice of a motion to dismiss the proceedings (Rec. p. 10).

On June 17, the Court ordered the petitioners to proceed within sixty days

> "in accordance with the terms and provisions of the Act of Congress, approved June 6, 1900."

This order was made without previous discussion, and without consent of the property owners or their counsel. (Rec. pp. 35, 36.)

August 9, 1904, the then acting Commissioners filed a supplemental petition, entitled in the same cause, and prayed the summoning of a jury of seven, *under the Act of June 6, 1900,* to re-assess the benefits from the extension of Eleventh Street (Rec. p. 11). Notice by publication was ordered, directing appearances by November 28 (Rec. p. 14).

The cause stood in this wise for more than fifteen months, and until February 9, 1906 (nearly seven years from its institution), when a jury of seven was summoned to retry *the question of benefits.* (Rec. p. 50).

The Bill of Exceptions shows the entry of an order which recites that the Court

> "having accepted said jury as qualified, and having administered to them an oath in accordance with the provisions of an Act of Congress, approved June 6, 1900, entitled" * *

but the justice presiding also certifies that

> "without having first examined said men or any one or either of them as to the qualifications prescribed by the said Act of June 6, 1900, the Court administered the oath to said men, that they would assess the benefits accruing to the property abutting or adjacent to 11th Street extended according to the Statute." (Rec. pp. 51, 52).

At the passing of the order last referred to, counsel for the land owners was not present (Rec. p. 51), but after the jury was thus sworn, and before they were instructed in their duties

> "the court not having done so, counsel for the appellant undertook to examine said jury as to their qualifications, but the Court refused to permit counsel

to ask them any question at all, because no questions were suggested before they were sworn. (Rec. p. 52.)

Counsel for the property owners then moved the Court to strike out the amended and supplemental petition on the grounds that it was filed without authority of law, and not in compliance with the order of March 3, 1904; and further, that if any action was to be prosecuted under the Act of June 6, 1900, it must be a new or original proceeding. This was overruled March 9, 1906, and by said order the property owners were given the right to interpose any objection they might desire with the same effect as if the Commissioners had begun a new suit. (Rec. p. 49). From this order the Commissioners appealed. (Rec. p. 49).

The plaintiff in error then pleaded specially. First, that the proceeding was barred by limitation; second; that the previous jury had found that the remaining parts of lots 1 and 30 in block 27, and lots 1 and 16 in block 28, and the land adjoining said lots would be damaged by the opening of the said street, and the verdict had been confirmed by judgment, and that, therefore, the issue as to whether the said lots were benefitted by the extension of Eleventh Street had been adjudicated, and the said judgment was pleaded in bar. (Rec. p. 50).

Plaintiff in error then moved to discharge the jury as not having been selected and summoned as required by law, which motion was overruled, an exception being noted. (Rec. pp. 54, 55).

The plaintiffs in error excepted to the instruction given, and to the refusal of the Court to grant certain prayers for instruction presented on its behalf.

June 6, 1906, the jury returned a verdict which assessed benefits against the property of plaintiffs in error to the

amount of $24,500. (Rec. pp. 105, 106, 107). The parts of lots 1 and 30 in block 27, and lots 1 and 16 in block 28, not taken for the street, were assessed respectively, $1,500, $1,500, $4,000, and $5,000.

Plaintiff in error moved to set aside the verdict, but the motion was overruled, and the verdict confirmed. (Rec. p. 48).

A bill of exceptions was taken and the cause appealed to the Court of Appeals, which affirmed the judgment below. A writ of error was then taken to this Court. (Rec. p. 130).

ASSIGNMENT OF ERRORS.

I. The Court erred in refusing to strike out the amended and supplemental petition, and in permitting the petitioners to proceed under the Act of June 6, 1900, instead of under the Act of March 3, 1899, under which the proceeding was commenced, and as required by the opinion of the Court of Appeals.

II. If the amended and supplemental petition might lawfully be prosecuted under the Act of June 6, 1900, the Court erred in not inquiring of the jury of their qualifications, and in not administering to the jurors the oath required by said Act.

III. The Court erred in refusing to discharge such jury on motion of plaintiffs in error.

IV. The Court erred in overruling the plea of *res judicata*, as to lots 1 and 30 in block 27, and lots 1 and 16 in block 28, and in suffering the said second jury to consider if said lots were or were not benefitted.

V. The Court erred in not sustaining the plea of limitations interposed by plaintiffs in error.

VI. The Court erred in granting the first prayer given the jury on behalf of the Commissioners, and in instructing

the jury that "by extension of the street, the jury are to understand its establishment, laying out and completion for all the ordinary uses of a public thoroughfare or highway."

VII. The Court erred in granting and giving to the jury the third instruction asked by the Commissioners.

VIII. The Court erred in rejecting the 1st, 2nd, and 3rd prayers for instructions submitted on behalf of the plaintiffs in error, and each of them. (Rec. pp. 53, 54.)

IX. The Court erred in overruling the motion of plaintiffs in error to vacate the verdict of the jury, and in confirming the said verdict over the appellants' objections.

X. The Court erred in refusing to review the evidence taken before the jury and to determine if the verdict was unjust and unreasonable.

ARGUMENT.

I.

The cause was instituted under a law which provided for a first jury of seven, to be followed, in case of dissatisfaction with their verdict, by a jury of twelve. The Court of Appeals distinctly held upon the Commissioners' first appeal, that the property owners were entitled to have the *jury of twelve,* and remanded the cause for further proceedings in conformity with their opinion and decree. (Rec. p. 9, and *McFarland et al. v. Byrnes, 19 App. D. C., 538*). This was long after the enactment of the Act of June 6, 1900. The Court below ignored the mandate and the opinion, and proceeded under an act which allowed only one jury of seven.

We submit that whether the Court of Appeals was or was not right, the Court below should have obeyed the mandate. Right or wrong, this was the law of the case. *U. S.*

v. N. Y. Indians, 173 U. S., 464; Chaffin v. Taylor, 116 U. S., 567. And we submit that the Court of Appeals was right in its decision that the Act of 1900 did not repeal the Act of 1899, and that the further proceedings should have been under the first Act. The Court said:

> "The holding of this Court that the Act of March 3, 1899, was unconstitutional, did not, therefore, avail to set in motion the instrumentalities of the Act of June 6, for reassessment. And when the Supreme Court of the United States held the Act of 1899 to be a constitutional and valid exercise of legislative authority, *the reasons for reassessments under the Act of June 6, vanished.* Nevertheless, by the discordant tenor of judicial decision the appellees were induced to forego a right which should now be restored to them, that of summoning a second jury under Chapter II."

Upon the appeal from the judgment upon the second verdict the Court of Appeals held plaintiffs in error estopped to make this objection, because, by a motion filed June 17, 1904, it asked the dismissal of the proceedings

> "because the law under which such proceeding must be had has been repealed"

and because the petitioners had failed to proceed. (Rec. p. 10).

We submit that this motion, which was substantially overruled by the refusal to dismiss, cannot be held to operate as an estoppel by election, and that the decisions cited by the Court of Appeals to sustain its opinion, and which show only that an election by a plaintiff *between forms of remedies,* will bar, are wholly inapplicable.

The cause having been instituted under Chapter II, and that statute not having been repealed, the Court should have proceeded under that Act.

II.

The failure of the Court to interrogate the jurors as to their qualifications and to administer to them the oath required by law, vitiates the verdict.

In empanelling the second jury in March, 1906, the Court was proceeding under the Act of June 6, 1900. That statute provides for the selection of jurors having certain special qualifications, and in terms requires that the Court *shall* administer to them an oath or affirmation in terms which are carefully set out. (31 Stat., p. 665). Without examining the persons summoned as to their qualifications under the statute, the Court disregarded the statutory oath, and swore the jury only to

> "assess the benefits accruing to the property abutting or adjacent to Eleventh Street extended, according to the statute." (Bill of exceptions: Rec. p. 52).

A little later the Court refused to permit counsel for plaintiffs in error to inquire of the jurors of their qualifications. It was, therefore, not ascertained if the jurors were "interested in the land to be condemned, or related to the parties interested therein," nor did they obligate themselves to make the assessments, *"without favor or impartiality to the best of their judgment,"* as this mandatory statute requires.

It is true that in the order signed by the judge (Rec. p. 50), it is recited, that the Court "accepted the jury as qualified," and "administered to them an oath in accordance with the provisions of an Act of Congress, approved June 6, 1900, entitled" * * * , but these general terms are explained by the same judge in the bill of exceptions signed by him, in which he certifies that he took no steps to learn

if the jurors were qualified, and adopted a form of oath which omitted all the requirements of the statute. His conclusion, that the oath administered was in accordance with the statute, must give way to his certificate showing the terms of that oath thus administered. *Wertz on Courts and their jurisdiction, p. 128; Thompson v. Whitman, 18 Wall., 458; Knowles v. Gas Light Co., 19 Wall., 58; Cooper v. Newell, 173 U. S., 566; Forsyth v. Hammond, 142 Ind., 519.*

This was a special proceeding, not according to the course of common law, in which the Court acquired all its jurisdiction from the statute. It is true that the Court is one of general jurisdiction, but this will not affect the question. The rule in such cases is stated by *Wertz* as follows:

> "When the statute provides for the manner of acquiring jurisdiction, and the mode of proceeding thereafter, in this class of courts and cases, the provisions of the statute must be followed or the Court will be without power to act. And the proceedings must show upon their face that jurisdiction has been obtained and the power delegated by the statute has been exercised in the appointed mode."
>
> *Wertz on Courts and their Jurisdiction, p. 88.*

And the rule was laid down in this Court in an early case, as follows:

> "In summary proceedings, where a Court exercises an extraordinary power, under a special statute, prescribing its course, we think that course ought to be exactly observed, and those facts which especially give jurisdiction ought to appear, in order to show its proceedings are *coram judice*. Without this act of assembly the order for sale would have been totally void. This Act gives power only on a report to be made by the sheriff. This report gives the Court jurisdiction,

add without it the Court is as powerless as if the Act had never been passed."

Thatcher v. Powell, 6 Wheat., 119:

"When superior courts exercise special statutory powers, in accordance with the usual form of common law or chancery proceedings, the usual presumptions of jurisdiction are entertained; but when those powers are entertained in the special or summary manner, the record must show that the court had jurisdiction and *proceeded in the way provided by the statute.*" 12th Am. Eng. Enc. of Law, 276, 277 and 278. Windsor v. McVeigh, 93 U. S., 274.

"Assessments upon land can lawfully be made *only* when the statute which authorizes them has been substantially complied with." Grace v. Board of Health, 135 Mass., 490-497.

We cite some decisions in point on the facts:

A statute of Wisconsin provided for proceedings for the condemnation of lands for highways and that the commissioners to be appointed by the county judge before acting should be sworn *"justly and impartially to discharge their duties."* Certain commissioners were sworn to "fairly and impartially hear the evidence given and review the premises mentioned in the matter of the appeal in the above entitled matter, and fairly and impartially decide the same."

Held: That the oath administered was not in terms or in substance that required by the statute, and conferred no jurisdiction upon the Commissioners. *State ex rel Vos v. Hoelz, 69 Wis., 84.*

A Minnesota statute provided that commissioners to lay out roads should take an oath "that they will faithfully and impartially discharge their duties as provided by this act, and fairly and impartially assess the damages, if any, they

find to be sustained by owners of land through which said road may run, and then proceed to discharge their duties."

Certain commissioners to lay out a road took an oath that "we will faithfully proceed to locate and establish said State road according to the provisions of said act, and according to the best of our abilities."

Held: That the oath taken was such as the act required and the subsequent proceedings were void.

State ex rel. Berfield v. Board of County Com's. 27 Minn., 90.

A New Jersey statute enacted that when an application should be made for the opening of a street the Common Council should appoint a time for hearing objections, etc. The record showed that the Common Council simply directed the clerk "to give the required notice for objections."

Held: That the power delegated was not strictly pursued, and the jurisdiction failed.

State v. Mayor of Jersey City, 1 Dutch, 309; see also, State v. City of Passaic, 38 N. J. L., 172.

A California statute providing for the taking of land for public uses, required a petition to the city council to contain: "A statement that in the opinion of the petitioners *the public interests* require that the improvement asked for" be made. A petition contained a statement "that in the opinion of the petitioners the improvement asked for should be made."

Held: That the record affirmatively showed want of jurisdiction, and that the subsequent proceedings for condemnation in the County Court, based on that record, were invalid. *In re Grove Street, 61 Cal., 438; Dayton v. Western R. R. Co. v. Marshall, 11 Oh. St., 497; Crawford v. People, 82 Ill., 557; In re. Cambro Street, 57 Pa. St., 357.*

It is to be noted that counsel for plaintiffs in error in the

cause at bar promptly moved the discharge of the jury. (Rec. p. 55).

III.

The judgment upon the first verdict that the parts of lots 1 and 30 in block 27, and of lots 1 and 16 in block 28, not taken for the street, were in fact, damaged, was a bar to further inquiry on that point, and the plea of res judicata (Rec. p. 49) should have been sustained.

Parts of these lots, as platted, lay beyond the extended street lines. (Map, Rec. p. 2.) The grade of the new street required a deep cut, which would necessarily damage these untaken parcels. (Photographs, Rec. p. 99, 100.) The Court recognized this, and charged the (first) jury that "in estimating the damages to be awarded they should take into consideration the condition in which the remaining part of the land is left, by reason of the extension and opening of said street, and also the cost of protecting such part of the land adjoining such cut, and the buildings, if any, and make allowance accordingly."

Accordingly, the jury allowed "grade damages" of $2,500, $1,469, $6,300, and $6,300, respectively, in favor of the lots mentioned. (Rec. p. 4).

On the other side, under the head of "Assessment of Benefits," etc., they charged these remaining parcels with $1,517, $1,517, $4,687, and $4,591, respectively (Rec. p. 5), thus at once alleging that these parcels were both damaged and benefitted.

This assessment for benefits was vacated and the awards of damages confirmed, and payment thereof adjudged to be made. (Rec. pp. 6, 7).

This was a judgment, then, that these particular parcels were damaged by the extension of Eleventh Street.

When the second jury was sworn, in 1906, the plaintiffs in error pleaded *res judicata* as to those four parcels in bar of any investigation of benefits (Rec. p. 50), but the Court overruled the plea, and by the third instruction told the jury to find the damages done these parcels (and others similarly situated) by the change of grade, and in doing so *to review the finding of the first jury as to damages.* (Rec. p. 53). This jury then found these parcels benefitted, respectively, $1,500, $1,500, $4,000, and $5,000, or $12,000 in all. (Rec. pp. 16, 17).

The owner of these lots was a second time required to prove the damages sustained by the change of grade, although an unreversed judgment had established those damages six years before, and this although this second jury was powerless to increase the damages and award any further sum to the property owner. The importance of this is shown by the fact that the award for "grade damages" (by the first jury) in respect of the lots in these two squares was $16,569, while the actual cost of the grading, as subsequently determined, was $54,764.80. (Howell's test., Rec. p. 85).

If the Court had been asked to instruct the second jury that if they should find the amount awarded for "grade damages" by the first jury was inadequate to compensate the property owners for the necessary grading, they should award them such further amounts as would make them whole, would not the petitioners have objected, and the Court have held itself bound to refuse such charge?

That a judgment in condemnation proceedings is no more subject to impeachment than other judgments, and stands until reversed, is settled.

Seconbe v. Milwaukee & St. Paul R. R. Co., 90 U. S., 108; Am. & Eng. Ency. of Law, Vol. 6, p. 6.

The very point was passed upon in the Supreme Court

of New Jersey. An award of damages was made for the grading of a street. Fifteen years later an assessment for benefits accruing from that grading, was levied on the properties previously adjudged to be damaged. The court held that the first award when ratified was

> "equivalent to a judicial determination that the premises for which the compensation is awarded, are damaged, on a comparison of benefits and injuries, to the extent of the award, and so long as it stands neither the owner nor the city can gainsay it. *Aldridge v. Essex Public Road Board 22 Vroom, 166.* It is, therefore, not permissible for the city now to contend that the change of grade, thus adjudged to be on the whole detrimental to certain lots on which buildings stood. was, in fact, on the whole beneficial to the same property. So far as the assessments against such houses and lots have been levied for the grading of the street, they should be set aside," etc.
>
> *Davis v. Newark, 54 N. J. L., 596; Butman v. Vermont Cent. R. R. Co., 27 Vt., 500.*

It is further submitted that our contention is not in the least opposed to the doctrines of *Wight* v. *Davidson,* 181 *U. S., 371,* but gains support from it.

IV.

The proceeding under the "Amended and Supplemental Petition," filed August 9, 1904, was barred by limitation of time.

The petition was filed *more than four years* after the order of July 3, 1900, vacating the first assessment, and an even longer time after the approval of the Act of June 6, 1900. During all that time the property might have been proceeded against under the last cited statute, if it could be invoked at all, yet nothing was done under it.

The Statute of Limitations (Code, Ch. 41, Sec. 1265) provides:

> "And no action, the limitation of which is not otherwise specially prescribed in this section shall be brought after three years from the time when the right to maintain such action shall have accrued."

That a proceeding *in rem* for the recovery of taxes against real estate is an action there can be little doubt. In *Bristol v. Washington County, 177 U. S., 133-146,* this Court approved a decision of the Supreme Court of Minnesota, that the filing of a delinquent list for personal taxes was the institution of an action, which would be barred after six years under a statute which provided that actions "upon a liability created by statute," should be barred by the lapse of six years.

So under the same statute, proceedings to enforce the collection of taxes against real estate were held barred after six years.

County of Redwood v. Winona, etc., 40 Minn., 512.

To the same effect is the decision of this Court in *Meats v. County of Phillips, 108 U. S., 553;* where a proceeding in equity to have a County Court levy and impose taxes on a levee district was held barred by limitations.

It is apparent that this action accrued, if at all, under this statute, on July 3, 1900, when the Court declared the assessments for benefits illegal. The petitioners might *then* have filed an original proceeding under the Act of June 6, 1900, or their "supplemental petition," if that was ever the proper course to be taken. Their right to proceed *was complete as it ever became.* After three years passed that right was gone. If they had then filed an *original* petition, the plea of limitations surely would have been good. They are not helped by the filing of their petition by way of

amendment or supplement; it introduced into the case a feature quite new, and constituted a departure in law from the original petition.

In Union Pacific Railway v. Wyler, 158 U. S., 285, this Court reviewed the authorities upon this subject, and approved a statement of the general rule as follows:

> "While a new cause of action may be introduced by amendment, the established limitation on the operation of its relation to the commencement of the suit is, that if the amendment introduces new matter, or a different cause of action not within the *lis pendens,* as to which the statute of limitations has operated a bar at the time of making the amendment, it is as available as if the amendment were a new and independent suit."

That the plea of limitations is available against the District of Columbia, and the Commissioners thereof, is settled. (*Met. Ry. Co. v. District of Columbia, 132 U. S., 1, 11*).

The injustice of permitting an assessment for benefits, after six years, upon lands on the border of a rapidly growing city, such as Washington, must be manifest. In this case the appearance of the entire neighborhood changed between 1900 and 1906; streets were graded, sewers and water mains laid; houses built and a street railway put in operation on Eleventh street, which was also macadamized. (Rec. p. 60).

Witnesses simply could not exclude these facts from their consideration when testifying to the effect upon values of the condemnation of Eleventh Street. For example, the witness, Hopkins, called to testify for the petitioners, on being asked if he could give the market value of the ground without the car line and the improvements answered: "I don't think a living man could." (Rec. p. 59).

And see the affidavits of Robert E. Bradley et al. (Rec. p. 109).

V.

The Court erred in its instruction to the jury that they should assess benefits as for a street completed for all the ordinary uses of a public thoroughfare or highway.

The Act of March 3, 1899, authorized only "a proceeding *to condemn the land* necessary for the extension of Eleventh Street" on straight lines. It did not provide for the grading, guttering, sewering or macadamizing necessary to its "completion for all the ordinary uses of a public thoroughfare."

That the instruction was accepted by the jury as meaning what it says, is shown by the colloquy between counsel for the Commissioners and the chairman of the jury. (Rec. p. 64).

> "Mr. Sinclair: The Court said a completed street. The Chairman: I think the Court meant there, and what I will continue to consider, the condition of that street *as it is today*, leaving out the railroad. That is what the Court meant there."

And the expert witnesses were interrogated in the light of this understanding. Of the witness, Conrad Dodge, testifying to land values, a juror asked, "What is it worth *now?* (Rec. p. 57.) And of the witness, Hopkins, the attorney for the petitioners asked, "What is the value of the land now?" (Rec. p. 58).

And the Court emphasized its meaning by refusing the first, second and third prayers submitted by the plaintiffs in error (Rec. pp. 53, 54), which asked that the benefits to be assessed must be "the direct result of laying out and

establishing the street, and not the result of improvements since made, either in or upon the street itself, or abutting near-by lands."

The jurors then assessed benefits from a street completed "for all the ordinary uses of a public thoroughfare," although after the condemnation the Commissioners of the District of Columbia were, until further action by Congress, without authority to expend a dollar for making the extension practicable. As testified by the Surveyor, Eleventh Street extended was graded and cut under the appropriation act of 1901, and macadamized under the like act of 1902. (Rec. p. 60.) For the sewers, water mains and sidewalks the law provided special assessments on the abutting properties.

There was then no provision of the law for the completion of the street for all ordinary uses, and we submit the Court erred in giving this meaning to the words "extension of the street."

The statute contains no other words which can enlarge the meaning of the word "extension." This Court has determined the meaning to be given the term. In dealing with the Highway Extension Act of the District of Columbia, approved March 2, 1893, this Court held that the authority of the Court as found in Sections 6 and 7 of the Act, "to condemn a permanent right of way for the public" over the lands in question, did not include the actual laying out and construction of the new highways. And further, that the terms of Section 15, "highway condemned and established under this act," "laying out and opening of such highway," or simply "opening of any highway" evidently treat condemnation, establishment, laying out and opening of a highway as denoting one and the same thing, the appropriation or setting apart of land for a highway and throwing it open to public travel and *have no regard to the actual grad-*

ing or construction of the highway. Bauman v. Ross, 167 U. S., 548-586.

The term "opening of a street" was, in Ohio, held not to include "the improvement of a street or highway by grading, culverting, etc.", the Court saying:

> "The term opening refers to the throwing open to the public what was before appropriated to individual use, and the removing of such obstructions as exist on the surface of the earth, rather than any artificial improvement of the surface."
>
> *Reed City v. Toledo, 18 Ohio, 161-165.*

So the California Supreme Court said:

> "The *widening* of a street which is authorized by this act does not include the additional work of making the street suitable for travel and general use. The expense of such work is to be undertaken after the street has been widened. To widen a street is merely to enlarge its width, and the term widen cannot, under any construction of language, be extended to include grading and graveling."
>
> *Wilcox v. City of St. Louis, 101 Cal., 508.*

To the same effect are:

Gains v. Hudson County, 27 N. J. L., 12.
Baker v. Runnels, 12 Me., 237.

Counsel for defendants in error will doubtless urge that instructions 2 and 4 (Rec. p. 53) relieved from the error complained of. They are inconsistent with No. 1, but this does not better the situation, for, being inconsistent, they served only to confuse. An erroneous instruction is not cured by another inconsistent instruction.

11 Ency. Pl. & Pract., p. 146; Pitts. R. R. Co., v. Krouse, 30 Oh. St., 222.

"The diffiiculty created by inconsistent or contradictory instructions on a material point, is, first, that it is impossible for the jury to know which is to be their guide; and, secondly, it is impossible after verdict to ascertain which instruction the jury followed."

Standard Life, etc. Co. v. Sale, 121 Fed., 664, 669.

VI.

The first three instructions prayed by plaintiffs in error should have been given.

In substance these prayers asked only that the lands be assessed for such benefits, if any, as had accrued to the land from the *extension of the street only*. Since this was the only improvement authorized, these prayers correctly presented the rule. As we construe the first prayer granted the petitioners, these three prayers are in direct opposition to its theory. If that was wrong, these were right. If they were refused because supposed to be already substantially allowed in instructions 2 and 4, we submit that yet they should have been given, as setting out with much more clearness the true rule to govern the jury.

The refusal of the Court to consider the evidence taken before the jury.

The statute (31 Stat., 665,) provided that the jury might hear the evidence out of the presence of the Court; and the Court's order so directed (Rec. p. 51), and the testimony was so taken. Upon the coming in of the verdict, counsel objected to its confirmation because it was in disregard of the evidence, contrary to the evidence, and unreasonable (Rec. p. 108, par. 8). Counsel for plaintiff in error presented to the court the testimony reduced to writing, but "the court declined to hear the same or consider

it at the time in full," and afterward "without reading the evidence or having it fully read," the exceptions were overruled, and the verdict confirmed (Rec. p. 112). The statute provides that the court may set aside a verdict in such a case "when satisfied it is unjust or unreasonable." This necessarily requires that the court shall review the facts as exhibited in the testimony; and this duty may not be avoided by a refusal to sit with the jury. In such case he must consider the testimony as reported to him, whether by a stenographer or by undisputed affidavits. In this case the court received what he certifies to be "the substance of the evidence taken before the said jury" and then refused to consider it (Rec. p. 112).

See *Met. R. R. Co.* v. *District of Columbia, 105 U. S., 322.* And this court has the same right of examination. *Beyer v. La Fevre, 186 U. S., 114.*

The verdict was unreasonable and unjust. The abutting land of the plaintiff is what was not taken of lots 1 and 16 in block 28 and of lots 1 and 30 in block 27.

This property had a greater market value before the extension of the street and the grading (when it was left from 28 to 38 feet above the new grade, Rec. p. 86), than it had afterward, and the witnesses on both sides so testified.

> Doyle's test (Rec p. 55).
> Dodge's test p. 55; Walsh p. 63.
> Gordon p. 64; Mallery, pp. 64, 65.
> McLaughlin p. 67; Ballinger pp. 70, 71.
> Howenstein p. 74; Hawn p. 76; Meyers, p. 79.
> Shoemaker p. 81; Hill p. 82; Beal p. 85.
> Saunders p. 88; Earr p. 90; Ellerson p. 94.
> Minnix p. 95.

All of these witnesses, some of them being called by the District of Columbia, testified in substance or directly, that the lots in question were injured by the extension and grad-

ing; most of them thought the lots, when brought to grade, would not sell for as much as their market value before the extension of the street, and gave their reasons; one or two of them thought prices had appreciated, but attributed the supposed increase in value *to the building of the car line.* (Shoemaker, p. 81.)

None of the witnesses testified to a benefit to the property in question except upon the assumption that sufficient damages had been previously awarded the owners of blocks 27 and 28 to reduce them to grade. This was constantly assumed by counsel for the District (Rec. pp. 58, 74, 77, 78, 81). For example, the witness Terrell was asked (Rec. p. 78):

> "2. Assuming the owners of the property (referring to blocks 27 and 28) were awarded $16,000.00 as grade damages to enable them to restore the property to the new grade, to what extent would you say the property had been benefitted by the extension of 11th Street?"

And he answered:

> "A. If the amount is sufficient to grade the property it has been benefitted very much."

But this assumption was wholly mistaken, as proved by Mr. Howell, the engineer who actually did the grading of these squares. From the lots in blocks 27 and 28 there were to be removed to bring them to grade, 116,866 cubic yards of earth, at an average cost of 48 cents per yard or $56,095, while the whole amount of "grade damages" awarded by the first jury was $16,569 (Rec. p. 4). The amount thus awarded was even less than the amount ($16,807) necessary to reduce the *four abutting parcels only* to the grade.

Viewed from another standpoint:

According to the undisputed evidence lot 1 in block 28 and the other lots in said square, cost to grade at the rate of 65 cents per cubic yard (Howell's evidence, Rec. p. 86), the sum of $8,102.25; the assessment levied against this lot is $4,000.00, making a charge against it of $12,102.25. At the highest rate fixed by the evidence this lot, when graded, would be worth only $11,717.00.

Lot 2 in block 28 cost to grade $7,878.00; the assessment against it is $1,000.00, making a total of $8,878.00. Its value, at 30 cents per square foot, would be $8,416.40, and as will be seen, this lot is given no new street, no new outlet, and no new advantage whatever.

Lot 14 in block 28 cost $11,886.55 to grade, and is assessed for $1,000.00, making a total of $12,886.55. This lot, at 40 cents per square foot, is worth $10,727.20. Thus the cost of same, if this assessment is to stand, would be $12,886.55, $2,159.35 more than its value.

Lot 15 in block 28 cost to grade $15,609.75, and is assessed for $2,000.00, making a total charge of $17,609.75. This lot, at 40 cents per square foot, would amount to $10,727.20, leaving the lot, having cost the parties, including the tax, $6,882.75 more than it is worth.

Lot 16 in block 28 cost to grade $12,645.10, the assessment is $5,000.00, making a total of $17,645.10. The lot, at 50 cents per square foot, would be worth $11,478.00, $6,167.10 more than it is worth.

Now combine these lots and see the situation:

Lot 1, block 28, cost of grade and assessment	$12,102.25
Lot 2, block 28, grade and assessment	8,878.00
Lot 14, block 28, grade and assessment	12,886.55
Lot 15, block 28, grade and assessment	17,609.75
Lot 16, block 28, grade and assessment	17,645.10
Total	$69,121.65

While the proof shows these lots are worth only $53,-055.80. Now suppose we add to this the amount allowed for grade damages in this block, to wit: $12,600.00, we have a total asset of $65,655.80 or $3,465.85 less than what has been expended on the land or what it cost the owners if this assessment stands, and this does not take into consideration the grading of other lots west of those in question, which was made necessary by the cutting down of the street, and neither does it take into consideration the absolute depreciation in value of at least one-half, by the lowering of the whole tract.

Suppose we base our calculation on the basis of 48 cents per cubic yard for grading, which is the price fixed for the average of the whole work in both squares, not counting the other expenses:

Lot 1, block 28, grade and assessment.....	$9,981.20
Lot 2, block 28, grade and assessment.....	6,870.60
Lot 14, block 28, grade and assessment....	7,281.76
Lot 15, block 28, grade and assessment....	13,537.20
Lot 16, block 28, grade and assessment....	14,339.52
Total.....	$52,010.28

While the proof shows that the land, as said before, at its highest estimate, is worth only $53,055.80, or within $1,045.52 of the actual cost of grading and assessment. Add to this the $12,600.00 allowed as grade damages to two of the lots in this square and it will thus be seen, if this assessment is to stand, that the owners of same will have received for 128,081 square feet of land the sum of $13,-655.52, a little over 10 cents per square foot, when it must be conceded that this land, before the street was condemned

and opened, taking the price fixed by the verdict and award of the former jury (and that less than the value placed upon it by the District's own witnesses), would have been worth more than $77,000.00; but if we take the unreasonable and unwarranted estimate placed upon this land by the witnesses for the appellees, that of 25 cents per square foot before the street was opened (see Doyle's Ev., Rec. p. 55), the value of same would be over $32,000.00, an actual loss of $20,000.00.

Mr. Sims, another of appellees' experts, graciously places the value of this land at 35 cents to 45 cents per square foot before the street was opened. But we submit that there is no ground for placing the value of this land at less than the price fixed by the former jury; that, as it is shown, is much less than the price the witnesses for the appellees' predecessor placed upon it at a time when it was possible to know, or would be if the street had not been cut down. Dodge's Ev., p. 57.

Other witnesses say the land was worth $1.00, etc.

But the estimate given of 65 cents per cubic yard is nearer the cost of grading than 48 cents. See Howell's Ev., Record page 86, where he says the steam shovel work in block 28 would cost about 65 cents per cubic yard, and it will be seen that this calculation did not include the grading of land east of the building line, a strip about twenty feet wide of this enormous embankment that had to be graded by the property owners. Richard's Ev., Record page 60.

And did not include the grading of lot 3 and other land west of the land mentioned. Howell's Ev., page 86.

So the confiscatory conditions fully appear in any light the proposition is figured.

The court should have examined the proofs and not have taken it for granted that the jury had done no injustice.

Upon all these grounds we submit that the judgment confirming the jury's award should be reversed.

LEO SIMMONS,
ARTHUR A. BIRNEY,
Attorneys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 157.

COLUMBIA HEIGHTS REALTY COMPANY,
PLAINTIFFS IN ERROR,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST AND CHESTER HARDING (ACTING), COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANTS IN ERROR.

Many of the questions which arise on this record are identical with those in No. 148, the appeal in both cases being from the same original judgment. For a discussion of the questions common to both records, the court is referred to the brief filed by the defendants in error in No. 148.

The questions peculiar to this case relate—

First. To the matter of interrogating and swearing the jury.

Second. To the plea of *res judicata.*

Third. To the reasonableness and justice of the assessments and the refusal of the court to hear all the evidence which had been offered before the jury.

I.

The record shows compliance with the provisions of the statute with respect to the summoning, accepting, and swearing of the jury. Also that no objection was made as to these matters until after the jury returned their verdict.

The second assignment of error relates to the alleged failure of the court to interrogate the jurors as to their qualifications and to administer to them the oath required by law. The act under which the proceedings were had provided that the court, after the return of the marshal and the filing of proof of publication of the notice, should—

> "cause a jury of seven judicious, disinterested men, not related to any person interested in the proceedings and not in the service or employment of the District of Columbia, or of the United States, to be summoned by the marshal of the District of Columbia, to which jurors said court shall administer an oath or affirmation that they are not interested in any manner in the land to be condemned, nor are they in any way related to the parties interested therein, and that they will without favor or partiality to the best of their judgment assess the damages each owner of land taken may sustain by reason of the extension of said street, and the condemnation of lands for the purpose of such extension and assess the benefits resulting therefrom as hereinbefore provided."

The return of the marshal (R., 50) recites that—

> "Pursuant to an order of the Supreme Court of the District of Columbia made today in the above-entitled

cause, you are hereby summoned as one of a jury of seven disinterested men, not related to any person interested in these proceedings and not in the service or employ of the District of Columbia or of the United States, to be empanelled and sworn on the 16th day of February, 1906, at 10 o'clock a. m., to reassess the benefits of an act of Congress approved June 6, A. D. 1900, entitled 'An act for the extension of Columbia Road east of Thirteenth street, and for other purposes.'

"(Signed) AULICK PALMER,
"United States Marshal."
R.

The record further shows (R., 51) the order of the court accepting the jurors summoned by the marshal as indicated, as follows:

> "The marshal having summoned John E. Harrell, William A. H. Church, William B. Cox, James F. Oyster, Edwin Fraser, Edward Graves, and John H. Nolan, as a jury herein, as directed by an order heretofore passed herein, and the court having accepted said jury as qualified and having administered to them an oath in accordance with the provisions of an act of Congress approved June 6, 1900, entitled 'An act for the extension of Columbia Road east of Thirteenth street, and for other purposes,' it is by the court ordered," etc.

The point is made that the court, being one of limited jurisdiction, every jurisdictional fact should appear on the face of the record. It is submitted that the recitals of the record satisfy all the requirements of the law, according to the great preponderance of authorities.

Lewis on Eminent Domain says on this subject, section 413:

> "*What the record should show as to the oath taken.*
>
> "The record should show that the commissioners have been sworn as required by law. Thus far there is no difference in the authorities. But as to how this should be made to appear in the record the decisions are at variance; some cases hold that the mere recital that the commissioners were sworn according to law is sufficient. (This proposition appears to be supported by the great weight of authority.)
>
> "Other cases hold that the facts should be stated which show a compliance with the law. The correct doctrine would seem to be that where the proceedings are under the supervision of a court of record and the tribunal is sworn at the bar of the court and the record of the fact is made a part of the proceedings in the case a simple recital that the oath was taken as required by law would be sufficient."

The record satisfies these requirements.

The plaintiffs in error rely in support of their contention upon the following statement in the bill of exceptions (R., 52):

> "On the 16th day of March, 1906, John E. Herrell, William A. H. Church, William B. Cox, James F. Oyster, Edwin Fraser, Edward Graves, and John H. Nolan, purporting to have been summoned, as aforesaid, appeared in said court and without having first examined said men or any one of them or either of them as to their qualifications prescribed by the said act of June 6, 1900, the court administered the oath to the said men that they should 'assess the benefits accruing to the property abutting or adjacent to Eleventh street extended, according to the statute.'"

There is nothing in this recital that contravenes the force or effect of the order of the court previously set forth accepting the jury.

The requirements of the act (see 4, *supra*,) respecting interest, etc., do not apply to this case, for the reason that this proceeding was not instituted for the purpose of condemning land. The recital in the bill of exceptions that the court administered an oath to the jurors that they should assess the benefits, etc., "according to the provisions of the statute" states practically a *pro tanto* compliance with the provisions of the law respecting the oath, which required that the jury should be sworn to "assess the benefits resulting therefrom (the extension of the street) as hereinbefore provided." It nowhere appears in the bill of exceptions or elsewhere in the record that the jury were not sworn to "faithfully and impartially assess," etc., and therefore the argument that the import of the order of March 16th, accepting the jury, is negatived by the statement in the bill of exceptions referred to, fails.

Again, if it appeared explicitly that the court had failed to administer the oath in strict conformity with the provisions of the law, no objection having been taken at the time by the plaintiffs in error, they having proceeded with the hearing before the jury, must be held to have waived that point. No objection or exception appears from the record to have been taken in the matter of administering the oath until after the jury had returned its verdict, and the objection came too late.

> "The first error assigned is that the jury who heard the case in the circuit court were not sworn in the manner directed by the statute.
>
> "The objection cannot avail the appellants anything in this court. It was the duty of counsel when he saw that the jury were about to be sworn

in the manner which he says is contrary to law, to have suggested same to the court; and, having failed to do so, the appellants cannot be permitted to urge the objection after verdict, either on the motion for a new trial or for the first time, in this court. Not having made the objection at the proper time he will be deemed to have waived whatever irregularity there may have been in the manner in which the jury was sworn." Rockford etc., R. R. Co. *vs.* McKinley, 64 Ill., 339.

"It is first urged that the return fails to show that the board was sworn to act as a judicial body, and that therefore it had no jurisdiction; and that, as the duties and powers under this act were not those prescribed by the consolidation act of 1882, their general oath of office was not sufficient to comply with the law. But no such objection was taken to the proceedings before the board of assessors; and the relator after having submitted himself to the jurisdiction of the board, cannot now be heard to raise the objection that they were not sufficiently sworn." People *vs.* Gillon, 76 Hon., 348.

"The objection that the committee was not sworn before giving notice of the time and place of hearing comes too late. * * * The reason given in all the cases is substantially the same, namely, that the party shall not take the chance of obtaining a decision in his favor without being bound by the result if the decision is against him.

"And in cases of this kind the court will presume knowledge on the part of the party objecting, unless the contrary is shown." Raymond *vs.* County Commissioners, 63 Maine, 110.

Therefore we contend: first, that all jurisdictional facts appear on the face of the record; second, that any objection as to the irrugularity in the form of the oath of the jurors was waived by the appellants by appearing and submitting their evidence to the jury.

The point that there was error in refusing to permit counsel to interrogate the jurors after they were sworn is equally without merit. No objection was made to any of the jurors, nor any motion made to discharge them on that ground, and to permit interrogation by counsel after the swearing of the jury in the absence of any allegation as to want of qualification, would, it is submitted, have been improper.

In the brief of counsel for the plaintiffs in error that they "promptly moved the discharge of the jury" (R., 55). The motion to discharge the jury referred to had no relation whatever to the oath administered to the jury. That motion was based on the allegation of counsel that the jury were summoned and empaneled by the deputy marshal instead of the marshal, as required by law, the basis for the motion being that the letter "R," supposed to indicate Robison, appeared underneath the signature "Aulick Palmer, U. S. Marshal" (R., 50). The motion was renewed after the return of the verdict, and the affidavit of Wm. B. Robison (R., 111) is directed to this contention. On this and the preceding propositions we quote from the opinion of Judge Barnard (R., 40, 41, 42).

> "Counsel for respondents contend that the jury was illegally constituted, because the members of it had been selected and summoned by the deputy marshal instead of by the marshal in person.
>
> "I am not able to see that the act of June 6, 1900, authorizing the marshal of the District of Columbia to summon jurors, requires that he should do this

personally. The law authorizes him to have deputies (sec. 186, Code, and secs. 780, 782, R. S. U. S.), thus seeming to recognize the fact that his duties are so numerous and so variant that it would be impossible for him to perform them all personally.

"Section 4 of the said act says that the jurors are to be summoned by the marshal of the District of Columbia, and does not say, 'or by his deputies,' although those words are used in the preceding section. That fact is not conclusive in my mind that the lawmakers intended the jurors should be summoned by the marshal personally.

"The language used for the summoning of grand and petit jurors in this District is similar to that used in said section 4, as will be seen by sections 210 and 211 of the Code, and by section 209, under certain contingencies, the court is authorized to direct the marshal to summon talesmen. In neither of these sections is any reference made to the deputy marshal, and yet it will hardly be contended that the marshal may not properly discharge the duties required of him by these sections, by his deputy or deputies.

"Section 4 of said act of June 6, 1900, provides that before accepting the jury, the court shall hear any objections that may be made to any member thereof, and shall have full power to decide upon all such objections, and to excuse any juror or cause any vacancy in the jury, when empaneled, to be filled; and it appears in this case that notice was given to the counsel for the respondents, of the time and place when the said jury would appear for acceptance, and be sworn, and given directions when and how to proceed with their duties; and at that time a number of counsel were present, and had the opportunity, if they so desired, to object to any of the said jurors, or to question any of

the said jurors, as to their qualifications for service in this proceeding; and if said counsel chose to allow the said jurors then to be accepted and sworn, without raising any objections, because of the manner of their selection, or because of any technical reason, it seems to me that they waived such point, and they would be afterward estopped from raising the same; and especially after going before such jurors, and offering testimony on the merits of the proceeding. The notice which appears to have been given to the various attorneys for respondents contained the names of the jurors, and the fact that they were selected under the provisions of the act of June 6, 1900, and that the court would be requested to empanel and swear said jury at 10 o'clock a. m., on March 16, 1906.

"The counsel also object to the form of the oath that was administered to said jury, the record disclosing that they were sworn in accordance with the provisions of the said act of June 6, 1900. The court must presume that all the provisions of said act, so far as the oath was concerned, were complied with, in the absence of any definite contradiction of the record.

"It might also be said that the said order of March 16, 1906, accepting the said jury, and reciting that the said jurors were summoned by the marshal, would preclude the contention thereafter in this proceeding, and with no change of circumstances, that such was not the fact. Every presumption would be in favor of the verity of said order."

II.

The award of the first jury of grade damages to the remainder is not conclusive of the question of benefits to the remainder.

The third assignment relates to the plea of *res judicata*, set up by these appellants. At the first hearing of this case the court instructed the jury that they were at liberty to award as damages not only the value of the land taken for the extension of Eleventh street, but also damage to the remainder of the land, if the jury should find that said remainder might have been damaged by reason of being left high above the grade of the extended street (R., 2, 3), and the jury awarded in terms certain amounts to these appellants for grade damages. The point is therefore made that that award having been confirmed by the court and paid by the District of Columbia, constitutes an adjudication of the fact that the said remaining portions of land owned by these appellants were damaged, which adjudication precludes an assessment for benefits. This point, it is submitted, cannot be sustained. The former jury, in addition to the awards for land taken and grade damages to the remainder, assessed benefits against the remaining portions of such land in the sum of $36,000, indicating that their conception of their duties under the instruction of the court was to return by separate schedules the amount to be paid as damages and the amount to be assessed as benefits. This was the mode of procedure contemplated by the statute, which provides, section 7 (act of March 3, 1899):

> "That if the use of a part only of any piece or parcel of ground shall be damaged, the jury in determining its value shall not take into consideration any benefits that may accrue to the remainder thereof

> from the extension of said street or highway, but such benefits shall be considered in determining what assessment shall be made on or against such part or such piece or parcel of land as may not be taken, as hereinbefore provided."

It will be seen therefore that the return of the jury under the instruction of the court and the provision of the law just set forth can in no sense be considered as conclusive of the question of benefits to the remaining portion of appellant's land which were assessed by the second jury.

Furthermore, the judgment of the court confirming the verdict of the first jury as to the awards therein would not be conclusive upon the District of Columbia, for the reason that by the act of June 6, 1900, the Commissioners of the District of Columbia were *directed* to make application to the court for the confirmation of these awards, and for that reason the principles of *res judicata* would not apply. The owners, however, had their election in the premises. They were at liberty to file objections to the awards if they saw fit; not having done so and having accepted the payments, they are precluded from disputing the adequacy of said award before the second jury.

III.

Findings of fact of the jury will not be reviewed except on a showing of fraud, accident, or plain mistake.

The statute of June 6, 1900, under which the proceedings for a reassessment were had, in section 6 provides:

> "That the court shall have power to hear and determine any objections which may be filed to the said verdict or award and to set aside and vacate the same

in whole or in part when satisfied that it is unjust or unreasonable; and in such event a new jury shall be summoned, who shall proceed to assess the damages or benefits, as the case may be, in respect of the land as to which the verdict may be vacated, as in the case of the first jury."

The setting aside of the verdict is manifestly, according to the terms of this provision, a matter which is addressed to the discretion of the court. In overruling the motion to vacate the verdict the court has said, in effect, that it is not satisfied that the said verdict is unjust or unreasonable. From this ruling of the court it is submitted no appeal can lie. It is in the same category with a motion for a new trial, and is governed by the same legal principles.

In Shoemaker *vs.* U. S. (147 U. S., 282), which was an appeal involving the condemnation of land necessary for Rock Creek Park, the court said:

> "If, as we have said, the court below was right in refusing to restrict the Commissioners to a mere consideration of the evidence adduced, then it would seem to follow that the court could not be legitimately asked, in the absence of any exceptions based upon charges of fraud, corruption, or plain mistake on the part of the appraisers, to go into a consideration of the evidence. The court cannot bring into review before it the various sources and grounds of judgment upon which the appraisers have proceeded. The attempt to do so would transfer the function of finding the values of lands from the appraisers to the court. Such a course would have presented a much more serious allegation of error than we find in the objection as made.
>
> "The rule on this subject is so well settled that we shall content ourselves with repeating that quotation from Mills on Eminent Domain (246) made in the opinion of the court below: 'An appellate court

will not interfere with the report of commissioners to correct the amount of damages, except in cases of gross error, showing prejudice or corruption. The commissioners hear the evidence, and frequently make their principal evidence out of a view of the premises, and this evidence cannot be carried up so as to correct the report as being against the weight of the evidence. Hence for error in judgment of the commissioners in arriving at the amount of damages there can be no correction. The commissioners are not bound by the opinions of experts or by the apparent weight of evidence, but may give their own conclusions.' "

In Clapp *vs.* Macfarland (20 Appeals, 235), which was an appeal growing out of the extension of Sixteenth street, undertaken under the provisions of the identical act of Congress (June 6, 1900) under discussion here, the court said (page 229):

"If a statement of the testimony, which was taken before the jury, or any part of it, was necessary for a hearing before the court on the exceptions or objections, it could have been, and in fact to some extent it was, set forth in affidavits filed in the cause on both sides. It is not denied that these affidavits were considered by the court. They were not, it is true, allowed to prevail; but that is what may happen in any motion for a new trial.

"We must conclude in this point that the appellants had all the hearing in the court below to which they were entitled by the statute; and that the statute is not objectionable for refusal to authorize and allow such hearing.

"We have not here the means of determining whether the court below was right or wrong in its

determination of the exceptions interposed by the appellants. While it may be assumed that, in cases like the present, the right of appeal is given by the statute which established this court, and it is inferred from the 13th section of the statute under consideration that it was contemplated by it that the right might be exercised, yet it is impossible for this court to review the rulings of the court below upon matters of fact where the facts upon which those rulings are based are not brought before us by the bill of exceptions or in some other authorized way. We have here no bill of exceptions; we have not the facts in any way on which the jury acted. And yet we are asked here substantially to put ourselves in the place of the court below, and to grant what is virtually no more than a motion for a new trial, which that court has refused to grant. A motion for a new trial is usually in the discretion of the trial court, and ordinarily is not the subject of review in an appellate tribunal.

"It is true that there are some things in the record before us which may be supposed to have a tendency to show that the jury was misled, or improperly influenced by an apparent threat of counsel for the Commissioners, into the adoption of an erroneous standard of assessment; and that arbitrarily and without justification they assumed to assess one-half of the award of damages as benefits against the adjacent property. But they were allowed by statute to assess that amount; and inasmuch as in other cases, where the acts of Congress themselves have arbitrarily undertaken to direct the assessment of such one-half, such acts have been sustained by the Supreme Court of the United States as violating no right, we cannot assume to say that the jury adopted

an illegal and erroneous standard in this case. It is a question of fact, upon which we cannot pass, and not a question of law, that, in the absence of the threat to which reference has been made, the jury might have adopted some different standard."

In the case of D. C. *vs.* Cemetery (5 Appeals, 499) the court said:

"In the second place, with respect to the main appeal of the District of Columbia, that from the order of confirmation of the report of the commissioners of appraisement, no question is raised as to the right of appeal, notwithstanding the peculiar character of the proceedings; and we may assume that, in connection with the equity suit, instituted by the heirs of David Moore, and into which all the other proceedings have been incorporated, the appeal may be sustained. But then, so far as concerns this appeal by the District, we fail to find anything on which to review the decision of the court below. The burden of complaint is that the valuation of the land was excessive. But we have not the means of correcting that, even if we had the authority to do so. There is nothing whatever in the record, except two *ex parte* affidavits, which, of course, we cannot regard, to show excessive valuation, or to show the grounds upon which the valuation was based. We cannot review, much less reverse, upon such a record as this. To the commissioners and not to the court, it must be remembered, the law has committed the matter of the determination of value. Their report is the equivalent to the verdict of a jury; and the court should only interfere with the one as under the general rules of law, it would interfere with the other."

IV.

The refusal of the court to hear all the evidence.

The evidence was heard by the jury without the presence of the court, by direction of the court under the authority of section 4 of the act of June 6, 1900, which left that matter optional with the court. This testimony was presented to the court *in extenso*, and filed in the form of an affidavit by the stenographer, in support of the exceptions to the verdict.

The bill of exceptions certified that (R., 112):

> "After the counsel had argued the case upon the propositions of the law raised by the exceptions, counsel for the appellants in support of its motions and exceptions, offered to read to the court the said testimony, but the court declined to hear the same or consider it at the time in full, counsel saying that it would be his purpose to consider the same if the court found, after consideration, the propositions of law were against the appellant. But counsel had no further opportunity to argue said case on the evidence, and without reading the evidence or hearing it fully read the court passed an order overruling all the exceptions and confirming said verdict and refused to consider said testimony any further, and the appellant excepted."

It was not incumbent upon the court to hear all the testimony which had been presented to the jury. It is not an uncommon practice in courts of equity, where questions of law and fact are left entirely to the court, to consider the testimony in a condensed form. The court evidently heard sufficient testimony to be satisfied that there was sufficient evidence therein to support the findings of the jury.

That the court in first instance gave ample hearing and

consideration to the many exceptions filed to the verdict, is evidenced by the elaborate opinion filed in the case from which we again quote (R., 47):

> "Other exceptions by various owners of property are filed, all of which I may perhaps dispose of generally, without making special remarks relating to each individual case. In brief, the objections are, that the jury assessed benefits caused by the extension of the railroad and the building of houses and other improvements in the neighborhood, and that they did not and could not have confined their assessment of benefits to the actual increase in value of the lands occasioned by the extension of Eleventh street only; and that for that reason the whole assessment should be set aside.
>
> "There are some difficulties, to be sure, in getting at exact justice in any case of this kind. The jury were fairly instructed what their duty was, and they honestly, in my judgment, endeavored to perform that duty. Being relieved from the necessity of confining the assessment area to the 200-feet strip on each side of the street, they have in some instances gone beyond that, and they have also been relieved of the necessity of assessing any special amount, and have been told to assess benefits only where benefits existed, and to the extent of their existence caused by the extension of the street. The fact that they had to look backward instead of looking forward to judge these benefits may not have been more difficult than in the ordinary case to assess benefits before they have actually accrued to the lands, because in either case there must be some latitude given for the exercise of judgment.
>
> "Again it is claimed that the subdivisions made since the street was extended have affected the assessments

wrongfully, because there have been combinations by which owners of lots have subdivided land and made the lots now front on Eleventh street which before were not fronting on Eleventh street, and that no benefits should be assessed to those lands because of the purchase and subdivision since the street was extended. It may be true, and it therefore is presumed, that such is the case, but I am unable to see that the combination or subdivision of the lands made since prevents the jury from saying that the lands themselves were benefited by the extension of the street, even if no such changes had been made. If the subdivision or combination had not been made, the jury could possibly still have assessed the ground on the supposition that it would be made, because such subdivision or combination would be the most advantageous use that could be made of the property, and it might be presumed that the interest of the owners of the various properties benefited would induce them to make such use of it.

"At any rate, I am unwilling to disturb this verdict, by reason of any claims made by individual owners as to the amount of the assessment, because while it may be true that exact justice would require a few dollars more or less to be taken off of some lots, and a few dollars more or less to be added to other lots, still it is the office of the jury to fix that amount, and unless that duty has been performed in such a way as to convince the court that the assessment is unreasonable and unjust, the court would not undertake to disturb the verdict and require a new jury to make a reassessment.

"If a new jury was empaneled at this time, it would still be further from the date of the extension of the street, and the new jury would be perhaps more em-

barrassed than the present jury has been in ascertaining the exact amount of benefit to the neighboring lands, caused by the extension of the street."

The Assessments Were Just and Reasonable.

The testimony which appears in this record does not come under the certificate of the trial judge in the usual form that it is the substance of all the evidence in the case. The bill of exceptions (R., 55) states:

> "The following, purporting to be the substance of the evidence before the jury, which evidence was presented in court in the form of an affidavit by the stenographer after the verdict was returned and exceptions being heard."

And in the concluding certificate the court states:

> "The foregoing substance of the testimony taken before the said jury was abstracted by the appellant from the testimony filed as an affidavit in the case by order of the court."

The testimony, therefore, which appears in this record is the abstract of the plaintiffs in error. Counsel for the defendant in error contended below, and contend here, that as the bill of exceptions does not purport to contain the substance of the evidence, the court will decline to consider it. Apprehensive, however, that the court below might possibly adopt a different view, counsel for the District of Columbia suggested a diminution of the record in the Court of Appeals of the District of Columbia for the purpose of bringing before that court a more complete record of the testimony taken before the jury. The petition for certiorari was opposed by counsel for plaintiff in error (R., 117).

The Court of Appeals, however, denied the writ of certiorari on that suggestion, for the reason that the testimony should appear, if at all, in the bill of exceptions, and the appellant, not having brought up the complete record of the testimony, the court would decline to consider any of it.

Ample justification for the assessments returned can be found even in the *ex parte* abstract of the testimony contained in the record.

Testimony of Harold E. Doyle (R., 55, 56), W. A. J. Hopkins (R., 58), William Simms (R., 59), Thos. W. Smith (R., 61), P. J. Walshe (R., 62), Fulton R. Gordon (R., 63), Allan W. Mallory (R., 65), W. B. Turpin (R., 67), C. S. Bundy, J. P. (R., 89).

The verdict contains the following statement of the jury (R., 15).

> "That after being duly sworn by the court for the performance of our duties we personally viewed and examined the land in the neighborhood of the said extension with great care, and thereafter in the United States court-house, in the city of Washington, in said District, on the 28th day of March, 1905, at 2 o'clock p. m., and from time to time thereafter pursuant to adjournment, after due notice to the persons interested therein, we met and heard and received such evidence as was offered or submitted to us on behalf of the District of Columbia and by the persons interested, touching the benefits which have accrued to property by reason of the extension of said Eleventh street as aforesaid, and upon our personal view and examination aforesaid, and the evidence aforesaid, we find that the lots, pieces and parcels of land which have been benefited by the aforesaid extension of Eleventh street are the lots, pieces or parcels of land mentioned, set forth and described in the following schedule; and we, the jury aforesaid, find

that the several lots, pieces and parcels of land mentioned and set forth in said schedule have been benefited to the extent of the respective amounts mentioned and set forth in said schedule, and we hereby assess against said lots, pieces and parcels of land, respectively, as and for benefits, as aforesaid, the several amounts mentioned, specified and set forth in said schedule."

This declaration is not negatived by any showing in the record.

The Cost of Grading Blocks 27 and 28.

The first jury, in addition to the award for the land of the plaintiffs in error, awarded grade damages in the sum of $16,569.00 (R., 4). An instruction authorizing such an award was granted by Judge Hagner (R., 2, 3), to which instructions the Commissioners of the District of Columbia excepted.

No objection was made to this award by the plaintiffs in error. The money was paid to and accepted by their predecessors in the title on August 16th, 1900 (R., 105, top of page). The award of the first jury, its payment and acceptance without protest is, it is submitted, conclusive upon this proposition.

Considerable stress is laid by counsel for the plaintiff in error upon the testimony of D. J. Howell, a civil engineer who was in charge of the work of grading the remainder of blocks 27 and 28, owned by the Columbia Heights Realty Company, his estimate being that the total cost of such grading would be in the neighborhood of $56,000.00, the argument being that the benefits assessed were excessive in view of the alleged cost of adjusting the property to the grade of Eleventh street. It is argued that the entire cost of this

grading was made necessary by the extension of Eleventh street, but this assumption, it is submitted, is altogether without warrant. The situation of this property was such that a large expenditure would have been necessary for grading in order to put it on the market in any event. Witness Thomas W. Smith (R., 61) testified on this proposition as follows:

> "I think the cutting down and opening of the street was the proper way to develop block 28. The people who owned the property ought to have a fair knowledge that they would be in the air and would have to dig their land down when that street was opened up to the public use. * * * Any person buying that property, referring to block 28, seeing its height above grade, knew positively that Eleventh street had to be extended, and bought it with that incubus on it which practically would be a mortgage on it of the cost of reducing that land to the level where houses could be built, and knew he was buying land which was reduced in value that much."

The extension of Eleventh street was but one of the incidents necessary to the subdivision of this property. Florida avenue, a street with an established grade, bounded the property on the south. In order to make the property available with reference to Florida avenue frontage, grading would have to be done. To make the property available with reference to Roanoke frontage, grading would have to be done. As shown on the plat offered in evidence by the plaintiff in error, page 110, showing a proposed subdivision, new streets were to be cut through, etc. All of this grading to a distance of three hundred feet back from Eleventh street, on the theory of the plaintiffs in error, is chargeable to the extension of that street. It is submitted that only such grading as was necessary to adjust that property to its

Eleventh street frontage should have been considered, which would be to a depth of about 100 feet on that street. Moreover, the $16,000 awarded by the first jury was paid to and accepted by the plaintiffs in error in August, 1900. It is in evidence that Eleventh street was cut through at a cost for excavation of 28 cents per cubic yard, whereas the cost of excavating the remainder of blocks 27 and 28 at the time the excavating was done (1908) was 48 cents per cubic yard. The most important element in the cost of excavation is the distance of the haul, and if these appellants had used the money awarded to them for that purpose at the time Eleventh street was opened the necessary excavation could have been done for the amount awarded.

Again, counsel for the plaintiffs in error in their brief estimate the cost of grading block 28 at 65 cents per cubic yard. Their testimony is that they were having the entire work done at 48 cents per cubic yard. An opinion by their witness, Mr. Howell, to the effect that the grading on block 28 was more expensive than that on block 27 is their basis for the altogether unwarranted assumption that the grading on block 28 was costing 65 cents per cubic yard. In fact, according to their own testimony they were paying 48 cents per cubic yard for all of it.

The owners of the property received an award of $46,000 as damages. In the ordinary course of real estate operations, parties subdividing land dedicate the streets and do the necessary grading to make the land marketable at their own expense. In this case the owners are $46,000 better off, less the assessment levied against them, than would be the case in an ordinary real estate operation of this character.

Respectfully submitted.

EDWARD H. THOMAS,
JAMES FRANCIS SMITH,
Attorneys for Defendants in Error.